

AUG 08 2006

PTO/SB/21 (09-04)

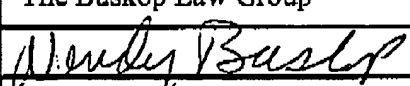
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TRANSMITTAL FORM (to be used for all correspondence after initial filing)	Application Number	10/675,515	
	Filing Date	09/30/2003	
	First Named Inventor	Jacqueline Evyne Breuninger Buskop	
	Art Unit	3677	
	Examiner Name	Reese, David C	
Total Number of Pages in This Submission	11	Attorney Docket Number	1207.01A

ENCLOSURES (Check all that apply)		
<input checked="" type="checkbox"/> Fee Transmittal Form <input checked="" type="checkbox"/> Fee Attached <input type="checkbox"/> Amendment/Reply <input type="checkbox"/> After Final <input type="checkbox"/> Affidavits/declaration(s) <input type="checkbox"/> Extension of Time Request <input type="checkbox"/> Express Abandonment Request <input type="checkbox"/> Information Disclosure Statement <input type="checkbox"/> Certified Copy of Priority Document(s) <input type="checkbox"/> Reply to Missing Parts/Incomplete Application <input type="checkbox"/> Reply to Missing Parts under 37 CFR 1.52 or 1.53	<input type="checkbox"/> Drawing(s) <input type="checkbox"/> Licensing-related Papers <input type="checkbox"/> Petition <input type="checkbox"/> Petition to Convert to a Provisional Application <input type="checkbox"/> Power of Attorney, Revocation <input type="checkbox"/> Change of Correspondence Address <input type="checkbox"/> Terminal Disclaimer <input type="checkbox"/> Request for Refund <input type="checkbox"/> CD, Number of CD(s) _____ <input type="checkbox"/> Landscape Table on CD	<input type="checkbox"/> After Allowance Communication to TC <input checked="" type="checkbox"/> Appeal Communication to Board of Appeals and Interferences <input checked="" type="checkbox"/> Appeal Communication to TC (Appeal Notice, Brief, Reply Brief) <input type="checkbox"/> Proprietary Information <input type="checkbox"/> Status Letter <input type="checkbox"/> Other Enclosure(s) (please identify below):
Remarks Appeal Brief 9 pages		

SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm Name	The Buskop Law Group		
Signature			
Printed name	Wendy Buskop		
Date	8/8/2006	Reg. No.	32, 202

CERTIFICATE OF TRANSMISSION/MAILING

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This collection of information is required by 37 CFR 1.5. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to 2 hours to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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<p><i>Effective on 12/08/2004.</i> Fees pursuant to the Consolidated Appropriations Act, 2005 (H.R. 4818).</p> <h2 style="margin: 0;">FEE TRANSMITTAL</h2> <h3 style="margin: 0;">For FY 2005</h3>		<p>Complete If Known</p>	
<input checked="" type="checkbox"/> Applicant claims small entity status. See 37 CFR 1.27		Application Number	10/675,515
		Filing Date	09/30/2003
		First Named Inventor	Jacqueline E. B. Buskop
		Examiner Name	Reese, David C
		Art Unit	3677
TOTAL AMOUNT OF PAYMENT		(\$) 250	Attorney Docket No. 1207.01A

METHOD OF PAYMENT (check all that apply)

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FEE CALCULATION

1. BASIC FILING, SEARCH, AND EXAMINATION FEES

Application Type	FILING FEES		SEARCH FEES		EXAMINATION FEES		Fees Paid (\$)
	Fee (\$)	Small Entity Fee (\$)	Fee (\$)	Small Entity Fee (\$)	Fee (\$)	Small Entity Fee (\$)	
Utility	300	150	500	250	200	100	\$500.00
Design	200	100	100	50	130	65	\$0.00
Plant	200	100	300	150	160	80	\$0.00
Reissue	300	150	500	250	600	300	\$0.00
Provisional	200	100	0	0	0	0	\$0.00

2. EXCESS CLAIM FEES

Fee Description	Fee (\$)	Small Entity Fee (\$)
Each claim over 20 (including Reissues)	50	25
Each independent claim over 3 (including Reissues)	200	100
Multiple dependent claims	360	180

Total Claims **Extra Claims** **Fee (\$)** **Fee Paid (\$)**
 - 20 or HP = _____ x 25 = _____

HP = highest number of total claims paid for, if greater than 20.

Indep. Claims **Extra Claims** **Fee (\$)** **Fee Paid (\$)**
 - 3 or HP = _____ x 100 = _____

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3. APPLICATION SIZE FEE

If the specification and drawings exceed 100 sheets of paper (excluding electronically filed sequence or computer listings under 37 CFR 1.52(e)), the application size fee due is \$250 (\$125 for small entity) for each additional 50 sheets or fraction thereof. See 35 U.S.C. 41(a)(1)(G) and 37 CFR 1.16(s).

Total Sheets	Extra Sheets	Number of each additional 50 or fraction thereof	Fee (\$)	Fee Paid (\$)
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4. OTHER FEE(S)

Description	Fees Paid (\$)
Non-English Specification, \$130 fee (no small entity discount)	_____
Other (e.g., late filing surcharge): <u>Appeal Brief</u>	250

SUBMITTED BY			
Signature	<i>Wendy Buskop</i>	Registration No. (Attorney/Agent)	32,202
Name (Print/Type)	Wendy Buskop	Telephone	713-403-7411
		Date	8/8/2006

This collection of information is required by 37 CFR 1.138. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 30 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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CENTRAL FAX CENTER**AUG 08 2006****PATENT****IN THE UNITED STATES PATENT AND TRADEMARK OFFICE****In re application of:**
Jacqueline Evynne Breuninger Buskop**Group Art Unit: 3677****Serial Number: 10/675,515****Examiner: Reese, David C****Filed: 09/30/2003****Confirmation Number: 6098****For: ADVERTISING DEVICE FOR
PRODUCE AND CANDY VENDORS****Attorney Docket Number: 1207.01A****Mail Stop Appeal Brief - Patent**
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I hereby certify that this correspondence is being transmitted via facsimile to the MAIL STOP Appeal Brief - Patent division of the United States Patent and Trademark Office at facsimile no. 571-273-8300 on the following date: August 8, 2006. (TOTAL PAGES: 11)


Richard Yuen

08/09/2006 AKELECH1 00000058 501313 10675515

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Sir:

On June 13, 2006, Appellant filed a Notice of Appeal in response to a Final Office Action dated May 2, 2005, issued in connection with the above-identified application. In support of the appeal, Appellant hereby submits this Appeal Brief to the Board of Patent Appeals and Interferences.

Since the notice of Appeal for the present invention was received and stamped by the USPTO Mailroom on June 13, 2006, the two-month date for filing this Appeal Brief is August 13, 2006. Since this Appeal Brief is being filed on August 8, 2006, this paper is believed to be timely filed.

Attorney Docket: 1207.01
Serial No: 10/675,515

1

If an extension of time is required to enable this paper to be timely filed and there is no separate Petition for Extension of Time filed herewith, this paper is to be construed as also constituting a Petition for Extension of Time under 37 CFR § 1.136(a) for a period of time sufficient to enable this document to be timely filed.

The Commissioner is authorized to deduct the fee for filing this Appeal Brief (\$250) from Buskop Law Group P.C., Deposit Account No. 50-1313. No other fee is believed to be due in connection with the filing of this document. However, should any fee under 37 CFR § 1.16 to 1.21 be deemed necessary for any other reason relating to this document, the Commissioner is hereby authorized to deduct said fee from Buskop Law Group Deposit P.C., Account No. 50-1313.

I. REAL PART IN INTEREST

The present application is owned by Jacqueline Evynne Breuninger Buskop, age 9.

II. APPLICANTS INTENTION BEHIND THE INVENTION

Applicant, aged 9, thought that a light would be useful and inventive. This thought came forth when at Disneyworld Applicant realized that actors could wear the earrings in the dark while performing the "illuminations" show. This would permit employees to wear the earrings, walk around in the dark, and still sell food products and candy.

III. RELATED APPEALS AND INTERFERENCES

Appellant are not aware of any related appeals and/or interferences that might affect the outcome of this proceeding.

IV. STATUS OF CLAIMS

Claims 1-2, 4-10, and 12-14 remain pending in this application. Claims 1-2, 4-10, and 12-14 are rejected under 35 USC § 103(a) as being unpatentable over US Patent No. 5,201,578 (hereinafter *Westmoland*) in view of case law. Claims 3 and 11 have been cancelled.

The claims currently under consideration, ie, Claims 1-2, 4-10, and 12-14 are listed in the Claims Appendix.

Attorney Docket: 1207.01
Serial No: 10/675,515

V. STATUS OF AMENDMENTS

There was an amendment filed on February 3, 2006 to address the informalities made by the Office Action dated November 29, 2005. Applicant believe that the Claims as presented in the February 3, 2006 Response Amendments to the Office Action are in proper form for allowance.

VI. SUMMARY OF CLAIMED SUBJECT MATTER

Generally, and as described below, one or more embodiments of the claimed invention are directed to an advertising device for produce vendors or candy vendors comprising: at least one carrying clip with a back side and front side for engaging a non-pierced ear; at least one hook secured to the earring clip; at least one edible food item such as candy, fruit a vegetable, or combinations of these items which can be pierced by the hook and removably secured to the hook.

Figure 1 illustrates a front view of the apparatus secured to an ear with two blueberries attached. Applicant's Application, p. 2, lines 17-22. In the illustrated embodiment, the apparatus has an earring clip (10) for engaging a non-pierced ear (100). *Id.* One hook (12) is secured to the earring clip (10) and one edible food item (14) or two edible food items (14a) can be removable secured to the hook (12). *Id.*

The apparatus is contemplated for the use and display of edible food items that have skins that can be pierced with a hook, but still maintain their shape. Applicant's Application, p. 3, lines 15-18. The edible food items can include candy. Applicant's Application, p. 23, lines 19-22.

VII. GROUNDS FOR REJECTION TO BE REVIEWED ON APPEAL

1. Whether Claims 1-2, 4-10, and 12-14 are patentable over US Patent No., 5,201,578 (hereinafter *Westmoland*) in view of case law.
2. Whether Claims 1 and 8 are properly objectionable?

VIII. ARGUMENT

Attorney Docket: 1207.01
Serial No: 10/675,515

The rejected Claims 1-2, 4-10, and 12-14 in view of *Westmoland* in further view of case law are allowable for several reasons.

THE OFFICE ACTION FAILS TO ESTABLISH A PRIMA FACIE CASE OF OBVIOUSNESS AGAINST CLAIM 1 AND 8

Examiner proposed in the Office Action dated April 4, 2006 an "obviousness" assertion that jewelers would have been aware of the ancillary, corollary, and atypical use of "food items" such as their application as the one proposed by the Examiner. This is contrary to *In re Dembiczak* 175 F.3d 994, 30 USPQ2d 1614 (Fed. Cir. 1999). In *In re Dembiczak*, the Court reversed a 35 USC § 103 rejection based on "the relationship between the fields of conventional trash bags and children's crafts, respectively ([t]he artisan would also have been aware of the ancillary, corollary, and atypical uses of 'trash' bags such as their application in hobby and art projects").

Applicant believes that no such relationship has been demonstrated. Since the Office Action cited no other references to support this "obviousness" assertion, the Applicant is forced to infer that the Examiner had made this assertion based on personal knowledge. No supporting affidavit has been made of record. According to 37 CFR § 1.104(d)(2),

When a rejection in an application is based on facts within the personal knowledge of an employee of the Office, the data shall be as specific as possible, and the reference must be supported, when called for by the applicant, by the affidavit of such employee, and such affidavit shall be subject to contradiction or explanation by the affidavits of the applicant and other persons.

The Examiner has failed to provide any substantiating prior art or any affidavit in accordance with 37 CFR § 1.104(d)(2) in relating that jewelers would have been aware of the ancillary, corollary, and atypical use of "food items". The Applicant submits that this fact alone sufficiently establishes that the Examiner has failed in his proof of making a prima facie case of obviousness. Accordingly, the claims are allowable for this reason alone.

THE OFFICE ACTION FAILS TO PROVIDE THE BROADEST

REASONABLE INTERPRETATION OF CLAIM 1 AND 8

Generally, as noted above, one or more of the embodiments of the present invention are directed towards an advertising device for produce vendors or candy vendors comprising: at least one earring clip with a back side and front side for engaging a non-pierced ear; at least one hook secured to the earring clip; at least one edible food item such as candy, fruit, a vegetable, or combinations of these items which can be pierced by the hook and removably secured to the hook.

Against this general backdrop, Claim 1, which is representative of Claims 2, and 4-7 is discussed. Claim 1 calls for an advertising apparatus for produce vendors with at least one earring clip, a hook secured to the earring clip, and one edible food item removably secured to the hook. The claim further calls for an automatic LED disposed onto the clip for lighting the edible food item.

Claim 8, which is representative of Claims 9-10 and 12-14 is discussed. Claim 8 calls for an advertising apparatus for candy vendors with at least one earring clip, a hook secured to the earring clip, and one chewy candy item removably secured to the hook. The claim further calls for an automatic LED disposed onto the clip for lighting the chewy candy item.

The Examiner asserts that Claim 1 and Claim 8 are unpatentable over *Westmoland* in view of case law under section 103. *Westmoland* is directed to an article of jewelry having a body with two plate members which sandwich a battery between them and have lighted elements electrically connected between the plate members to be illuminated by the battery. *Westmoland* Abstract. *In re Said*, as applied by the Examiner is used to distinguish that matters relating to ornamentation only, which have no mechanical function, cannot be relied upon to patentable distinguish the claimed invention from the prior art. See Office Action April 4, 2006. Applicant's invention is not just decorative, but edible and decorative.

The Examiner's approach to construing the claims is inconsistent with the well established principles of claim construction. The Examiner relates that, with respect to the "edible food items" they are matters relating to ornamentation only. The Examiner's position is legally improper, as it eviscerates the broadness requirement enunciated by the Federal Circuit.

See *DeGeorge v. Bernier*, 768 F.2d 1318 (Fed. Cir. 1985) ("Claims during prosecution...are given the broadest reasonable interpretation possible"). Based upon Federal Circuit precedent Applicant's edible food items should not be construed as ornamentation only, but instead construed as an actual component of the invention. Edible food items of Applicant's Application should be given the broadest reasonable interpretation and not simply disregarded, and in doing so refer to Applicant's specification for their interpretation.

Applicant's Application refers to "edible food items" as "blueberries, strawberries, dried fruits, blackberries, cherry tomatoes, and other fruits and vegetables with similar sturdy yet pierce-able skins". Applicant's Application page 3, lines 17-18. Applicant's Application refers to "chewy candy items" as "soft licorice, soft raspberries, juicy fruits, and similar soft yet pierceable candies". Applicant's Application page 3, lines 23-24. Applicant's choice of "edible food items" and "chewy candy items" is not based upon its aesthetic appeal for ornamentation instead they are based off their durability and ability to stay upon the hook. In doing so the typical user of Applicant's invention, produce vendors and candy vendors, would be able to display and advertise those "edible food items" and "chewy candy items" in which they want to.

THE REFERENCES AS CITED IN THE OFFICE ACTION FAILS TO DISCLOSE CLAIMED FEATURES OF APPLICANT'S APPLICATION OF CLAIM 1 AND 8

Notwithstanding the Examiner's failure to comply with Federal Circuit precedent, *Westmoland* fails to disclose the claimed features, even under Examiner's construction of the claim terms.

The first element of Claim 1 in Applicant's Application calls for an earring clip wherein one hook is secured onto the clip and a food item is secured to the hook. An automatic LED is additionally disposed on the clip for lighting the food item.

The first element of Claim 8 in Applicant's Application calls for an earring clip wherein one hook is secured onto the clip and a chewy candy item is secured to the hook. An automatic LED is additionally disposed on the clip for lighting the chewy candy item.

In *Westmoland*, even assuming that "edible food items" and "chewy candy items"

Attorney Docket: 1207.01
Serial No: 10/675,515

are chosen solely for their aesthetic appeal for ornamentation, Applicant's "edible food items" and "chewy candy items" are hung from the earring clip not from the lighting element as in *Westmoland*. In *Westmoland*, the pierced earring wire (10a) is attached to an lighting element (4a) whereby decorative elements (29) may be hung from. *Westmoland* Figure 8, Column 6 line 37 – Column 7 line 15. Applicant's Application, as demonstrated in Figure 2, attaches an LED light (16) secured to an earring clip (10). The earring clip (10) additionally has hooks (12) and (15) wherein the edible food items or candy items are to be hung by. Applicant's Application page 3 line 1 – line 10, Figure 2.

In view of the foregoing, it is respectfully submitted that the Examiner erred in not allowing all claims pending in the present application over the prior art of record. The undersigned attorney may be contacted at (713) 275-3400 with respect to any questions, comments, or suggestions in relation to this appeal.

Respectfully submitted,

Date: 8/8/06



Wendy K. Buskop
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Reg. No. 32,202

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7

**RECEIVED
CENTRAL FAX CENTER****AUG 08 2006****CLAIMS APPENDIX**

1. (Previously Amended) An advertising apparatus for produce vendors comprising:
 - a. at least one earring clip with a back side and a front side for engaging a non-pierced ear;
 - b. at least one hook secured to said earring clip;
 - c. at least one edible food item removably secured to said hook, wherein said edible food item is selected from the group: a fruit, a vegetable, and combinations thereof; and
 - d. an automatic LED disposed on a lower portion of the front side for lighting the edible food item.
2. (Original) The advertising apparatus of claim 1, wherein at least one hook comprises at least two hooks connected in series.
3. (Cancelled)
4. (Previously Amended) The advertising apparatus of claim 1, wherein said LED light is a blinking LED light that can be actuated with a switch secured to said earring clip.
5. (Original) The advertising apparatus of claim 1, wherein said hook is between 1.5 inches and 3 inches in overall length.
6. (Original) The advertising apparatus of claim 1, wherein said hook is adapted to have at least a first prong and a second prong for engaging at least two food items.
7. (Original) The advertising apparatus of claim 1, wherein the edible food item is selected from the group: blueberries, strawberries, dried fruits, blackberries, cherry tomatoes, kiwi fruits with similar sturdy yet pierce-able skins, and vegetables with similar sturdy yet pierce-able skins.
8. (Previously Amended) An advertising apparatus for candy vendors comprising:

- a. at least one earring clip with a back side and a front side for engaging a non-pierced ear;
 - b. at least one hook secured to said earring clip;
 - c. at least one chewy candy item removably secured to the hook; and
 - d. an automatic LED disposed on a lower portion of the front side for lighting the chewy candy item.
9. (Original) The advertising apparatus of claim 8, wherein said candy is selected from the group: soft licorice, soft raspberries, juicy fruits, and like soft candies.
 10. (Original) The advertising apparatus of claim 8, further comprising a line wherein said hook connects said line near said earring clip and a second hook connects to said line further from said earring clip than said hook.
 11. (Cancelled)
 12. (Previously Amended) The advertising apparatus of claim 8, wherein said LED light is a blinking light that can be actuated with a switch secured to said earring clip.
 13. (Original) The advertising apparatus of claim 8, wherein said hook is between 1.5 inches and 3 inches in overall length.
 14. (Original) The advertising apparatus of claim 8, wherein said hook is adapted to have at least two prongs for engaging at least two candies.